NO. 870

—IN THE—

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN C. KINGSBURY, JAMES P. HARVEY, and A. G. KERNS, Administrator of the Estate of James Clark, Deceased,
Appellants,

vs.

THE BUFFALO HUMP MINING COMPANY (a corporation), and THE EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY (a corporation),
Appellees.

Upon Appeal from the United States Circuit Court for the District of Idaho, Northern Division.

Brief of Appellees

W. B. HEYBURN,
Solicitor for Appellant.

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Brief of Appellees

We are served with brief of appellants in this case, which opens with a "statement," but it does not seem that the statement is in conformity with the requirements of Paragraph 2 of Rule 24 of this Court, in that the statement does not purport to set out the questions involved in the manner in which they are raised, but disregards the issues made by the pleadings,

both as to form, substance and manner of presentation, and is intermingled with argument to such an extent that the specific questions involved on the appeal can not readily be determined.

We therefore, under paragraph 3 of Rule 24, present the following statement of the case.

STATEMENT OF CASE.

This is a suit brought by appellant for the cancellation of a deed and to compel the re-conveyance of an undivided four-fifths interest in the Ella and Missing Link lode claims, situated near the town of Burke, in Shoshone County, Idaho. The complainant also asks for injunction, a receiver and an accounting.

Appellants base their claim to the relief asked on the allegation that the deed was procured from them by the defendant, Buffalo Hump Mining Company, through its representative, Charles Sweeny, under such circumstances as would authorize a court of equity to annual the transaction and cancel the deed, or direct reconveyance. It is alleged that the defendant, Empire State-Idaho Mining & Developing Company, purchased with knowledge of the alleged wrongful acts on the part of Sweeny.

The facts as they appear from the record are that from about 1895 the mining claims known as the Tiger and Poorman had been operated together under the ownership of the Tiger & Poorman Consolidated Mining Company, the grantor

of the defendant, the Buffalo Hump Mining Company, under the management of F. R. Culbertson, and that since the sale of them by that company they have been worked by the defendants. These mines had been worked separately from 1885 to 1895, and the development upon them was very extensive. From 1887 to 1895 one of the plaintiffs, Patrick Clark, was the General Manager of the Coeur d'Alene Silver Lead Mining Company, the owner during that time of the Poorman claim, and had sole charge of its development. During the time while he was so in charge, he and some of his personal friends secured title to a fractional portion of the claim lying to the east of the Poorman claim and covering a space on the ledge between the Poorman and the O'Neil claims, which was called the Ella and Missing Link Fractions. It also appears that the ledge passes from the Poorman claim eastwardly into the Ella and Missing Link Fractions and beyond into the O'Neil.

During the time that plaintiff Patrick Clark was manager of the Poorman mine he used the work and development on that mine as a means through which to explore and work the Ella and Missing Link claims for the benefit of himself and his partners.

The plaintiffs allege that long prior to the 13th day of October, 1899, they were the owners of an undivided four-fifths interest in the Ella and Missing Link lode claims, and that the other undivided one-fifth interest in the claims was

owned by F. R. Culbertson, who was a tenant in common with them. That the Ella and Missing Link claims were contiguous to each other, and were bounded on the east by the O'Neil, and on the west by the Poorman claim. That Charles Sweeny was agent and General Manager for defendant, Buffalo Hump Mining Company, and the Empire State-Idaho Mining & Developing Company. That both of the corporations defendant were organized under the laws of the State of New York.

That Charles Sweeny and F. R. Culbertson were citizens and residents of the State of Washington; that Culbertson was the Superintendent, under Sweeny as General Manager, of the Buffalo Hump Mining Company, and was in charge of the operations of the concentrating mill and the mining property of the defendants.

In the fourth paragraph of the complaint it is alleged that one of the plaintiffs, Patrick Clark, was the agent for all of the other complainants, and as such agent was authorized to manage and conduct the mines and mining interests in which they were tenants in common, including the Ella and Missing Link claims, with full power and authority on his part to bargain for the sale of the same.

That during the summer and fall of 1899, the defendant, Buffalo Hump Mining Company, was the owner of the Tiger and Poorman mines. That these mines had been worked for many years and that at that time they were practically worked out to a depth of about sixteen hundred feet. That the Ella

and Missing Link lode claims both lay east of the Poorman claim, high up on the mountain, more than 1200 feet above the level of Canyon Creek, and that the apex of the vein on the Ella and Missing Link claims was about 2800 feet above the lower workings of the Poorman mine.

The complaint alleges that in the summer and fall of 1899 the defendant, Buffalo Hump Mining Company, was mining extensively upon the Tiger-Poorman mine and had a combination shaft thereon, which started downward from the level of Canyon Creek, and was sunk to a depth of 1600 feet from the surface, and had exclusive possession of the shaft and all the workings connected therewith, and that no person, other than the Company, were *entitled* to access to the workings or to any information concerning the workings, or the condition, value, or extent of the ore reserves therein. That the drifts and stopes throughout the Tiger and Poorman mines, from said shaft to the Ella line, were more than two thousand feet in length and were winding and circuitous in their courses.

Plaintiffs allege that Culbertson was their agent and representative and had knowledge of the existence of valuable ore bodies within the Ella and Missing Link claims which it was his duty to communicate to them by reason of an alleged agreement on his part to do so; that Culbertson conspired with Sweeny to withhold all information as to the existence of ore bodies in the ground in controversy from the plaintiffs, in order that Sweeny might be able to purchase the Ella and Missing Link claims from the plaintiffs at a less price than he

would be able to purchase them for if they had knowledge of the alleged existence of valuable ore bodies therein.

In the sixth paragraph of the complaint they allege that in 1896 they conveyed a one-fifth interest in the Ella and Missing Link claims to Culbertson for the consideration, and with the understanding, that should the workings of the Poorman mine disclose any ore bodies so near the Ella mine as to render it probable that the ore bodies extended through the Ella claim, he should advise the plaintiffs of that fact and that the performance of these services was the only consideration that Culbertson was to pay for the one-fifth interest. It is alleged that this arrangement was known to the defendant, the Buffalo Hump Mining Company, at the time it purchased the plaintiffs' interest in the Ella and Missing Link claims.

Complainants allege that Culbertson knew of the existence of valuable ore bodies in the Ella and Missing Link claims, and that he suppressed and withheld such information from plaintiffs and thereby they were induced to sell their interests in the claims for a less price than they would have demanded had they been advised by Culbertson of such facts.

Complainant then alleges that about the 13th of October, 1899, Charles Sweeny, representing himself to be the General Manager of the Buffalo Hump Mining Company and also the General Manager of the Empire State-Idaho Mining & Developing Company, both defendants herein, entered into negotiations with Patrick Clark, one of the complainants, in regard to the purchase of the undivided four-fifths interest in the Ella

and Missing Link claims, and that he falsely and fraudulently, and for the purpose of cheating and defrauding the complainants, represented to Patrick Clark that he had then purchased for the Buffalo Hump Company all of the interest of Culbertson in the Ella and Missing Link claims for the sum of five hundred dollars; and that the Buffalo Hump Company was then the owner of an undivided one-fifth interest purchased from Culbertson and was a tenant in common with the plaintiffs. That Sweeny then offered to pay $4,000 to the complainants for their undivided four-fifths interest in the claims, and that he falsely and fraudulently represented to Patrick Clark, who was acting for the plaintiffs, that the Ella and Missing Link claims were no good and had no value as mining claims, but that he and the Buffalo Hump Company were desirous of acquiring the full ownership of all the claims in which the Company had any interest, including the Ella and Missing Link claims, for the purpose of forming the basis of a new corporation and making a big showing in the shape of surface ground, and that while the Ella and Missing Link claims were of no value as mining claims they would be of some value in the furtherance of said new corporation.

Complainants then charge that Sweeny, representing the Buffalo Hump Company, for the purpose of cheating and defrauding the complainants, suppressed the information from them that a large body of ore had been struck within the limits of the Ella claim by the Buffalo Hump Company, under his management and that of Culbertson, without the knowledge

or permission of the complainants, and in a secret, unlawful and clandestine manner. That the discovery of ore gave to the Ella and Missing Link claims an actual value of more than five hundred thousand dollars, and that such fact was well known to Sweeny and Culbertson, and to defendant, Buffalo Hump Mining Company, and was unknown to complainants.

Complainant then alleges that Culbertson was a tenant in common with plaintiffs, and was also Superintendent of the Buffalo Hump Mining Company, and that he conspired with Sweeny for the purpose of cheating the complainants and falsely and fraudulently represented to the complainants that he had sold his interest in the Ella and Missing Link claims to the Buffalo Hump Company for $500.00, and represented to the complainants that the mining claims were no good; that no ore had been discovered under ground either in the Ella or Missing Link claims, or so near to them as to render it probable that the same extended into or through them, and that there was no value in the said mining claims. That the fact that Culbertson made these statements to the complainants was known to Sweeny, and by him and Culbertson such statements were known to be untrue.

Complainants then state they relied upon the representations of Sweeny and Culbertson, and believing the statements made by them to be true, and having no means of testing and finding out the value of the Ella and Missing Link claims, because of the fact that the representations were made at Spokane, in the State of Washington, and the claims were situated

more than one hundred and forty miles distant therefrom, and because of the fact that the complainants had *no authority* to make a personal inspection through the underground works of the Buffalo Hump Mining Company upon the claims, or otherwise, complainants accepted the price of $4,000 offered by Sweeny on behalf of the Buffalo Hump Mining Company, and on the 14th day of October, 1899, in consideration of $4,000 complainants executed *and delivered* a deed to the Buffalo Hump Mining Company for an undivided four-fifths interest in the Ella and Missing Link claims.

The complainant then alleges that long prior to making the offer by Sweeny to the complainants to buy their interest, Sweeny, as General Manager of the Buffalo Hump Mining Company, had, by means of diamond drills and drifting, penetrated the Ella and struck a large and valuable body of ore therein, which was a continuation of the Tiger-Poorman vein, and which had its apex within the limits of the Ella and Missing Link lode claims, and that this was known to *Culbertson* and unknown to complainants.

The complainant alleges that Culbertson had not sold to the Buffalo Hump Mining Company for $500.00, and had not sold his interest at all at the time he made the representation to the complainants, but complaint alleges, on information and belief, that shortly after the Buffalo Hump Mining Company had purchased the complainants' interests for $4,000.00, they purchased Culbertson's interest for $75,000.00.

The complaint then alleges that the Buffalo Hump Mining Company took the property with full knowledge of the alleged fraud. They then charge that the mine is worth one million dollars, and that the defendants have extracted $450,000.00 in values from it.

The complaint then charges that the Empire State Company is insolvent, and that its affairs are in a bad way.

THE ANSWER.

The answer denies all of the allegations of cheating and defrauding on the part of Culbertson and Sweeny, or either of the defendants.

Denies that the complainants had done little or no work upon the Ella and Missing Link claim further than to make assays and do development work thereon, but allege the fact to be that the complainants had practically mined out everything of value in the Ella and Missing Link claims above the 800 level, said level being 1,100 feet below the apex of the vein, and allege that the complainants had taken large quantities of ore therefrom, sold and received the proceeds thereof, and that they had mined within the ground in controversy for more than five years and were fully conversant with all of the facts touching its value, present, past and prospective.

Denies that any of complainants, or any person acting for them, at any time, by inquiry, request, or other means, ever

sought to enter, inspect, investigate or obtain knowledge as to the character, value, extent or direction of any workings or exploration in the Ella or Missing Link claims through the combination shaft, or otherwise, and allege that all of said workings were at all times open and subject to the inspection of complainants, or any of them.

The defendants disclaim any knowledge as to the contract which complainants allege they made with Culbertson.

Complainants not having seen fit to make either Sweeny or Culbertson defendants, the two defendant corporations could not answer of their own knowledge for Culbertson as to the contract, but have answered on the information received from him, and on such information deny that any such contract was made with Culbertson as is alleged in the complaint.

In the sixth paragraph of the answer the defendants deny having any knowledge whatever as to the conditions, terms or circumstances relative to the making of the conveyance to Culbertson or as to his relations to the complainants, and allege that neither of the defendants ever heard, or knew, of the alleged transactions between complainants and Culbertson until the commencement of the suit. The alleged statements as to the representations made by Sweeny to Clark in regard to the value of the property, are fully denied in the answer, and the denial sustained by the proofs offered by the defendants.

They deny that the property had any value above the price paid therefor at the time complainants sold it, and deny that it has now any such value as claimed by complainants.

ALLEGATIONS IN THE COMPLAINT NOT PROVEN.

At the trial the complainants failed to prove the allegation in the fifth paragraph of the complaint, that they had done but little work upon the Ella and Missing Link lode claims further than making the discovery and doing the necessary development work thereon.

They failed to prove the allegation contained in the seventh paragraph of the complaint that by reason of the work and development done within the limits of the Ella lode claim, without the permission of the plaintiffs in a secret, unlawful and clandestine manner, there had been given to the Ella and Missing Link lode claims an actual market value of more than $500,000.

Plaintiffs failed to prove the allegations contained in the eighth paragraph of the complaint, that Culbertson had falsely and fraudulently represented to the complainants that he had sold his interest in the Ella and Missing Link lode claims to the Buffalo Hump Mining Company, at the solicitation of Charles Sweeny, for the sum of $500.

Complainants failed to prove the further allegation in the eighth paragraph of the complaint, that Culbertson represented to the complainants that the Ella and Missing Link claims were no good, or that there was no ore discovered underground, either in the Ella and Missing Link claims, or so near the Ella line as to be probable that the same

extended into or through the Ella, or that there was no value to the said claims.

Complainants failed to prove the further allegation contained in the eighth paragraph of the complaint, that on the 13th day of October, 1899, the Buffalo Hump Mining Company had, by means of drifting, penetrated into the Ella and had found a large and valuable body of ore therein, which was a continuation of the Tiger-Poorman vein, or that at the time of making the conveyance in October the works of the defendant, the Buffalo Hump Mining Company had gone beyond the limits of the Ella into the Missing Ling claims.

The complainants failed to prove the allegation, set out in the ninth paragraph of the complaint, that at any time the Buffalo Hump Mining Company purchased the interest of Culbertson in the Ella and Missing Link claims for a consideration of more than $75,000, or for any consideration in excess of $1000.

The complainants failed to prove the allegation contained in the fifteenth paragraph of the complaint, that the Ella and Missing Link claims are worth more than a million dollars, or any sum in excess of the sum paid to the complainants therefor, or that the defendants had extracted ores of the value of $450,000, or of any considerable value, therefrom.

Complainants failed to prove the allegation contained in the fifteenth paragraph of the complaint, that the

Buffalo Hump Mining Company was practically insolvent, or that the defendant the Empire State-Idaho Mining & Developing Company was possessed of but little property of value beyond the Ella and Missing Link claims, or that said property as it had was involved in litigation of a complex character, or that it was insolvent.

We have denominated the foregoing allegations as not proven because they have not only not been sustained by any evidence, but they have been shown by the testimony of plaintiffs to be untrue.

In addition to such allegations, the complainants have utterly failed to sustain every material allegation upon which they seek to recover, as will be more particularly and fully pointed out hereafter in the argument.

ARGUMENT.

From the foregoing statement as to the facts, it will appear that the issues in this case are resolved down to—

1st. Did the complainants have knowledge or means of knowledge as to the value of the Ella and Missing Link claims at the time of their negotiations and sale to the Buffalo Hump Company?

2nd. Were they excluded by circumstances or as a fact from obtaining full information as to the value of the Ella and Missing Link claims prior to, or at the time of, the negotiations and sale?

3rd. Did either of the defendants, or any person authorized to speak for them, make any misrepresentation as to the facts relative to the value of the Ella and Missing Link claims to the complainants, or any of them?

4th. If such representations were made, did the complainants rely upon them in determining whether they would sell the mining claims to the Buffalo Hump Company, or in fixing the price at which they would sell?

5th. What were the conditions as to the development and value of the Ella and Missing Link claims at the time of the negotiations and sale?

The record in this case is extravagant, in that it contains a vast amount of utterly irrelevant material consisting of long documents that have no bearing whatever on the issues involved, and it is only with a vast amount of patient work that the material facts can be sifted from the record. The burden of this matter came in through the attempt of the complainants to support the third issue, heretofore stated, viz: "Did either of the defendants, or any person authorized to speak for them, make any misrepresentation as to the facts relative to the value of the Ella and Missing Link claims to the complainants or any of them?" This is pre-supposing that there was some duty resting upon the defendants, or some of them, at any time, to state any facts to the complainants, or some of them. Such duty could arise only from the existence of a fiduciary relation be-

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tween the parties under which the defendants, or persons representing them, were bound to advise the plaintiffs as to all of the facts touching the value of the property and of which the complainants could not otherwise inform themselves. If the complainants had knowledge, or opportunity to obtain knowledge, as to the value of the property the law requires them to protect themselves. In this case there is no allegation of the exclusion of the complainants, or that they could not have obtained all information upon inquiry.

When one party approaches another for the purpose of buying property the seller is put upon enquiry as to the value which he will place upon it. He is primarily supposed to know its value. If there are facts existing which might affect the value, of which he is not advised, it is his duty to seek information from a proper source. The law does not allow him to shut his eyes as to the facts which he might ascertain, and accepting the offer of the purchaser, reserve to himself the right to attack the sale in case he should afterwards discover that the property was worth more than the purchaser offered and paid for it. In this case it appears from the testimony of Patrick Clark, one of the complainants, that he did not take the word of the purchaser as to the value of the property; but that he raised him nearly double the price offered. He must be presumed to have done it on some information, as to the value of the property, independent of what the purchaser gave him, otherwise he would have accepted the price offered by the purchaser, if he relied at all upon th purchaser's statement of

the facts, or judgment as to the value of the property. The rules sought to be applied by the complainants in this case that where a seller relies upon the value placed upon the property by the purchaser, or upon statements made by the purchaser as to its value that he may compel a re-conveyance in case the purchaser has withheld facts, or misstated facts, in regard to the value of the property, has no application whatever in a case where the testimony establishes beyond controversy the fact that the seller did not accept the price offered or rely upon the facts stated by the purchaser. The testimony of Clark settles the question of fact in regard to this matter. Sweeny's general statements, if he made them, as to his object in purchasing, or as to the value of the property, fall far short of the class of statements to which the rule invoked by complainants is applied. We are therefore put to enquiry as to whether or not Culbertson made any statements to Clark or to any of the complainants in regard to the value of this property upon which they acted, and whether or not statements made by Culbertson would affect the integrity of the transaction.

Culbertson testifies that he made no statements to Clark as to the value of this property except as to the barren drift, and the testimony shows that the statements which he made in regard to that drift were true. Clark attempts in a general off hand way to state that Culbertson told him that there was nothing discovered of value at the time that he applied for the deed, but the testimony is so overwhelming against Clark in

this regard that nothing can be based upon it. The Court finds on the evidence, the fact, which is fully established, that Clark's statement that Culbertson asked him for the deed in Spokane at the time he claims these statements were made, is untrue, and that Culbertson wrote for the deed from Burke to Clark at Spokane, and that the deed was sent with his letter, written in his own handwriting, for execution. This is established beyond controversy by the fact that Clark's secretary is shown to have had the deed executed with some formalities suggested by Culbertson's letter and to have returned the deed to Culbertson at Burke. The receipt of it was acknowledged by Culbertson, thus establishing exactly the nature of that transaction. Clark does not pretend that Culbertson made any statements to him at any other time than at this alleged interview, which is shown not to have existed.

In considering this ground, we will take up the question as to what the facts were at the time of the sale. It appears that in August one of the defendants, having acquired title to the neighboring claims entered upon an extensive system of diamond drill work and that a hole was drilled from what is known as the "barren drift" in a northerly direction without any favorable results. That the drill was then swung around in the opposite direction, and without intention of doing so, it penetrated the Missing Link ground from the west, and discovered some very encouraging ledge material and ore. Notwithstanding this fact the defendant did not seem to have thought enough of the ore and ledge thus encountered by this

diamond drill hole to have taken any steps to open it up, but went further west and drilled another hole in a southerly direction, which was not started in, nor did it penetrate, the Ella claim, but it found some evidence of ore in the Poorman claim near by. The position of these holes will be found on the plat in the Transcript at pages 148 and 1294. If the defendant had intended to prospect the Ella claim with the diamond drill it would have undoubtedly projected hole No. 3 in an entirely different direction. No part of it is within the Ella claim and Culbertson says their object was not to prospect the Ella or Missing Link claims, but their own ground and that it was not until long after they had bought that they knew that they had entered plaintiffs' ground.

We would particularly call the Court's attention to the fact that the diagonal line crossing this diagram intersecting the face of the cross-cut is the east line of the Poorman claim, and that the Poorman claim is patented to that line, and is many years senior to the Ella and Missing Link claims. Both these diamond drill holes were made before the middle of August. Some time later in August the cross-cut was started in the Poorman claim running southward. It started at a short distance east of the drill hole No. 3. It appears that at about 45 feet from the mouth of this cross-cut some ore was encountered, but it does not seem to have been of sufficient importance to have caused the defendant to stop at that point and develop the same, but the cros-cut was driven further through lean and barren ground until they came to a small

streak of ore somewhere from three to six inches varying in width, a piece of which is in evidence and is here referred to for examination showing the exact width and character of the ore that was encountered at the face of this cross-cut.

The testimony establishes the fact beyond controversy that at the time of the sale of this property the work had not proceeded beyond the mere reaching of this last mentioned ore. Let us consider what it amounts to in a mine where the mere finding of ore, as the witnesses have testified, is not conclusive of the existence of ore bodies of sufficient importance to guarantee that they will be profitable upon being opened and worked. The testimony shows that such ore bodies are frequently encountered, which, upon development, prove to be of small or no importance. Such discoveries as are shown to have been made in this ground prior to the time of the sale by complainants, were slight evidence of values and would not have been taken as indications of any considerable value had they been inspected, by all parties, to any extent. They were merely indications of the possibility of the existence of ore bodies that might give a value to the property.

The complainants, in their argument and in the introduction of their testimony, have assumed at all times that in determining the question as to the value of the property at the time of the sale they were entitled to take into account those things and conditions that have resulted from the development of that which was then in sight. They introduced the testimony of witnesses to show what was afterward found in

the east drift driven from the end of the cross-cut; but the Court will bear in mind that not a foot of the east drift had been run at the time the plaintiff sold. They have introduced testimony as to what was taken from the intermediate drift in the cross-cut, but the Court will bear in mind that not a foot of the work of development on that intermediate drift had been done at the time of the sale. The ore in the intermediate cross-cut proved to be of little or no value upon further development, and it is established beyond controversy, that it was not until the south drift had been driven upward of 75 feet that any values were discovered in the streak of ore upon which the complainants placed so much reliance, in the face of the cross-cut. For 75 feet it was merely a streak indicating the existence of the ledge without any substantial values. At the time of the trial, and to this day, no work of development has been done to the west, upon the ore that was in the face of the cross-cut at the time of the sale.

Culbertson testifies that he did not attach much importance to what was called the find or strike of ore, because that from his experience in the mine, he knew that the existence of such indications, or ore, as was found in either the diamond drill holes or in the cross-cut was not reliable in determining the value of the mine. That the value could only be determined by subsequent developments.

It is evident from the testimony, and from all of the facts considered together, in this case that at the time of the sale by the complainants the property was not worth more than they

got for it. It is evident that if today the property stood undeveloped, except as it was on the date of the sale that they could not sell it to any person on earth for a dollar more than they got for it.

These facts being true, what information was withheld from the complainants of which they are entitled to complain? Even admitting that the information regarding existing conditions at the time of sale was not fully conveyed to them by the purchaser, or any person representing it. If no facts that would have established, or tended to establish a greater value than that received for the property, were withheld from the sellers, then it matters not what knowledge the purchaser may have had in regard to the property, or that such facts or circumstances may have been withheld from the complainant, unless such acts on the part of the purchaser tended to deceive and mislead, the complainant upon some point which the complainant was entitled to rely upon the purchaser or its representatives for information.

This brings us to the consideration of the fourth issue. As to whether or not, if such representations were made the complainants relied upon them in determining whether they would sell the mining claim to the Buffalo Hump Company or in fixing the price at which they would sell. We have already considered this question so far as it related to the transaction between Patrick Clark and Charles Sweeny wherein Clark asserts that he made the price because of the representations made by Sweeny, but we find that not only was Clark attempt-

ing to sell this property for a price which he himself fixed upon it, but that he was trying to sell Sweeny a half interest in the Sheridan claim, and made a sale of such interest a condition precedent to doing business for the Ella and Missing Link title.

It is important to consider the manner of the production of the testimony of Patrick Clark as well as its substance in regard to his experience and knowledge of conditions on the 600 and 800-foot levels. It will be borne in mind that all of the work on these levels was done under the management of Mr. Clark and that neither of them were accessible to the defendants or to any person connected with them at any time until after the commencement of this suit. That all knowledge as to the quantity and value of the ores taken therefrom and the condition of the ledge therein was the exclusive knowledge of the plaintiffs.

At page 490 of the Transcript Mr. Clark makes light of the vein on those levels, and says that they quit work because it did not pay: That at that time lead was from 3 cents to 3½ cents per pound, and that at the time Mr. Sweeny purchased, lead was 4 cents to 4½ cents per pound. (Trans., p. 491.) Mr. Clark was asked:

Q. Now, would the fact that you had less than a foot of ore there, and on the 1200 you had four feet of clean ore, and a vein of ore considerably larger that would pay to work, I will ask you to state as to what that indicates with reference to the future? To which witness replied:

"It indicates that it might continue on quite a distance, but that is speculative." Thus showing that Mr. Clark did not consider that an increase in size in a vein between the 800 and 1200-foot levels from one foot to four feet, indicated to a certainty the existence of great values. He admits it would be speculative. (Trans., p. 496.) He states that while he was the manager of the Poorman mine, he first penetrated the Ella ground with a tunnel in 1893 or 1894, he is not certain, That he did so from the 600-foot level of the Poorman claim, and ran clear through the Ella and Missing Link claims into the O'Neil. Run several hundred feet into the O'Neil ground. He thinks this was in 1893, but it was surely during the time of his management, and when he was giving personal attention to it. That he was frequently on the ground and in the workings of the mine (Trans., p. 497). That it was prior to the consolidation of the Tiger and Poorman mines. That he followed the vein on the 600-foot level through the Ella into the O'Neil ground.

We would particularly direct the Court's attention to the map (p. 1292 of the Trans.), in which these levels and the stopes hereinafter referred to in connection with them are shown in blue. Commencing at page 498 the Court will find the testimony of Clark in regard to the 600 and 800-foot levels, in which he says he "did a little stoping," but attempts to minimize it and to create the impression that it was of no special consequence. He says (p. 498) he does not know how much ore he shipped from these stopes; could not approximate it.

On page 499 he says the ore was mingled with that of the Poorman and he again declines to give any estimate as to how much of the ore there was, and when he is asked as to the books containing an account of such ores he says that he has no books; that he does not know what has become of them; that he does not know who has them; that he does not know who he turned them over to. He is pressed strongly in regard to the books and accounts and disclaims any knowledge of them or as to the value of the ores taken from these stopes.

Again, on page 512, he disclaims knowledge as to the width or value of the ore in the Ella claim, and on page 513 he says it was not profitable; that they made no money; that the Poorman bought the ore in a crude state; that it was weighed and sampled; that there was some arrangement but he cannot now recall it; that he has no book account of it; that he kept no personal account; that he had lost the books. That he represented all of his co-owners in the ore settlement between the Ella and Poorman. That whatever sums of money the Poorman paid the Ella for ore, was paid to him. That he does not think there were any books in existence (p. 514). That the Ella never shipped any ore as Ella ore, of which he has any recollection. That he cannot tell even approximately how much money the Poorman Company paid the Ella mine for ore which it bought of them. That he can only tell that the Ella owners made no profit out of it.

On page 515 he testifies that the lowest level that had been driven east from the Poorman was the level from which they

had stoped ore on the Ella ground. That they were driving the 1000-foot level in that direction, but he does not know how far it had been driven. That so far as the development of the mine was concerned at the time that he left the management of the Poorman mine, the lowest level that had been driven to the east showed stoping or shipping ore in the Ella ground. (Trans., p. 515.) His testimony shows that both the 600 and 800-foot levels were driven clear through the Ella and Missing Link claims into the O'Neil during his management. He says he does not remember having stoped ore in the O'Neil ground, two-thirds of which belonged to strangers. That he might have stoped a little on the 600-foot level. That it did not pay for doing the drifting through the O'Neil, hence there was nothing coming to the owners of that claim.

He admits (Trans., p. 515) that he charged the O'Neil owners with the cost of projecting this drift into their ground and made such charges an offset against the value of the ore which he took out of the O'Neil ground. That he did not charge the Ella owners with the cost of projecting the drift of the Poorman through their ground.

At a subsequent hearing, some twenty days later (Trans., p. 546), Mr. Clark brought into Court the books containing an account between the Poorman and the Ella claims of the ore taken from the 600 and 800-foot stopes. From these books it appeared that the Poorman Company had paid the plaintiffs, as owners of the Ella claim, $16,524.78 net for ores taken from that ground, and it appears from these books that

the expense of mining these ores was paid by the Poorman Mining Company. That the expense of the development by running tunnels through to the O'Neil ground was charged against the O'Neil claim bringing it in debt to the Poorman Company $17,858.54 and giving a credit to the O'Neil claimans for ores taken from the stope on the 600-foot level of $2,425.39, leaving a charge against the O'Neil claimants of $15,433.15 on account of labor and supplies and developing account.

Mr. Clark says he cannot remember what work was done on the O'Neil claim for the Poorman Company for which that indebtedness accrued. That he has no other books. That he cannot give the number of feet of development within the O'Neil ground. The Poorman Company owned a one-third interest in the O'Neil claim. He cannot tell the gross amount of ore taken out of the O'Neil ground (Trans., p. 557).

This is a general synopsis of Mr. Clark's testimony from which we are to gather the facts as to his knowledge, and that of Mr. Harvey, who had direct charge of the work under Mr. Clark, in regard to the evidences of value and their knowledge of value within the ground in controversy in this action. With lead worth $1.00 per hundred less than at the time Sweeny bought, the plaintiffs made a net profit of over $16,000 from two small stopes upon the ledge, and a reference to the testimony of witness Smith (Trans., p. 746) and following will show that the thickness of the ore and its quality in the 600 and 800-foot stopes at the time when Clark quit work

thereon, and at the time of the purchase by the defendants, and now is such that these stopes can be worked to a profit and that there is no material difference between the thickness and value of the ore exposed therein than between the thickness and value of the ore in the works of the defendants below the 1200-foot level. Samples of this ore were brought into Court (Trans., pp. 758-759). The testimony of the several witnesses introduced show conclusively the knowledge possessed by plaintiffs Clark and Harvey as to the values in the 600 and 800-foot levels at the time they quit work therein, which was doubtless because of the consolidation of the Tiger and Poorman claims, and the change of management.

Culbertson testifies that in discussing with Clark the fact that the barren drift had not picked up the ledge developed in the levels above, Clark suggested that the ledge probably laid to the south of the barren drift thus indicating clearly that he was on the alert as to the possibility of ore bodies being discovered in the lower levels in this mine to the south, as the fact afterwards appeared to be, and did not consider the failure to find ore in the barren drift conclusive as to the value of the property.

Primarily the value of property is to be taken as the price fixed by the plaintiffs as their selling price, but they say that had they known the facts in regard to the development of the property and the condition shown by such development, they would not have sold at that price. And Patrick Clark, one of the plaintiffs, who represented all of the other plaintiffs in ne-

gotiating for the sale of the property, testifies that he had been engaged in mining for 35 years. That for eight years he had been the general manager and had direct charge and control of the working of the Poorman mine which abuts upon the ground in controversy on the west and also for several years had actually mined and operated the ground in controversy, extracting therefrom $16,524.78 net worth of ore when lead was from 3 cents to 3½ cents per pound.

He testifies (p. 488 of Trans.) that had he been advised of all that he is now advised of as to the condition of the mine at the time of selling, that he did not think he would have been very anxious to sell, but would consider it worth perhaps $100,000. He testifies (p. 519) that it would cost about $300,000 to equip the claims in controversy to work them as an independent mining proposition. At page 489 he was handed the annual report of Charles Sweeny, as manager of the Empire State-Idaho Mining & Developing Company, which is plaintiff's Exhibit 17, wherein Sweeny says, in speaking of the entire group of mines at Burke, which consists, among others, of the Tiger and Poorman mines, together with the Ella and Missing Link, O'Neil and others, that "there is nothing in the lowest workings to show any decrease in the value of the ores, or in the quantity; and with cheap electric power later on for pumping and general purposes, there is no reason why this property should not be worked profitably to a depth of 5,000 feet." And witness was then asked that assuming that Sweeny was correct in this conditional prophesy, and that the ore bodies

in the Ella should extend downward in the earth 5,000 feet with virgin ground above it up to the 800-foot level, what, in his opinion, would be the value of the Ella and Missing Link claims? Whereupon the witness replied, "About $1,000,000." But the witness declined to second Mr. Sweeny's opinion in regard to this hypothetical proposition. Nevertheless, on the strength of this question and answer the complainants have assumed that there was a million dollars in values involved in this suit, when as a matter of fact Clark testifies that had he known all that Sweeny is allleged to have known at the time of the purchase he would have fixed the value not to exceed $100,000, and this, based upon the expenditure for development of $300,000. This witness was thoroughly experienced in the selling of ores and the working of mines of this character. He testifies, at page 491, that when they quit working on the 600 and 800-foot levels of the Ella and Missing Link claims that lead was worth at least a cent a pound less than when he sold to Sweeny and yet up to the time that they quit working on those stopes, it was paying. And he admits, on page 491, that the prospect when he quit work was based upon at least a foot of good ore.

As a hypothesis for his statement, that the mine was worth $100,000 at the time he sold, he says that had he known of the values that existed, about one of the first things that he thinks he would have done would be to take in the O'Neil, if he could get it, and work the claims jointly, if not he would work it by sinking a shaft on the Poorman Extension property which was

then controlled by him and his friends and would have operated it in either manner. He admits that he did not own the O'Neil claim. That a man by the name of O'Neil owned one-third; the Standard Mining Company one-third and the Buffalo Hump or Tiger-Poorman one-third. He does not pretend to know that the outstanding interests in the O'Neil claim could have been bought but thinks the Buffalo Hump Company afterwards purchased them. The witness then enters into an elaborate description of the method in which he would have worked this property at a preliminary expenditure of $300,000 for equipment. To a mining man the proposition is so absurd as to need scant consideration. It is evident that the property had no value except it could be worked through the already developed neighboring claims to the west, and over this claim Mr. Clark did not have, nor could he have obtained, any control that would have enabled him to work the property.

In estimating the value of a mining claim on a given date, as before stated, we must consider only the conditions that existed at that time. Taking into consideration the length on the ledge, the fact that a diamond drill had penetrated the ledge as described by the witness, and that a cross-cut had barely reached it at the time of the sale, afforded no reasonable basis upon which to conclude that the property was worth any more than the sum paid for it. The purchaser was taking all the chances of getting even the purchase price back according to the testimony.

It seems that all through this case there has been a disposition to consider the ore that was developed after the sale, by the plaintiffs, in determining the value of the property at that time; and the fact that no one can make any estimate upon the existence of ores not actually developed has been lost sight of. The testimony of plaintiffs' own witnesses establishes the fact, beyond a question, that it was weeks after the sale of the property by the plaintiffs before ores of any value were encountered in the mine in the running of the east drift from the cross-cut or elsewhere. It is equally evident from the evidence in the case that the ores that have been extracted from the mine upon which so much stress has been laid, were developed in the depth, by defendant, at great expense and many months after the sale by the plaintiffs. If, as plaintiffs contend, the existence and production of ores on the 600 and 800-foot levels was not a sufficient assurance to them of the existence of ores on the 1200-foot level, why are we to conclude that the existence of ores on the 1200-foot level, that had produced no values at the time of the sale by plaintiffs, should be accepted by the defendants as a guaranty of great values at that time, and that the Court should now hold them responsible for the value of the ores which they struck in the months following the purchase in ground that had not been then open. The question as to the values must be determined upon the conditions that actually existed at the time of the sale, and under the circumstances of this case, the plaintiffs are entitled to no

presumptions therefrom as to the ore bodies undeveloped, or as to the future value of the ground.

Under the law, if one sells a mine after having had an experience equivalent to that of the plaintiffs herein in its management and development, and the purchaser, acting on his judgment, believing that the mine will develop great values, purchases, and, within the day of purchase should, develop such values, the seller could take no advantage of that fact, and claim that the purchaser should have given the seller the benefit of such judgment.

From all of the facts in the case as developed by the testimony, it is a sure thing that no other purchaser than Sweeny could have been found who, with a full knowledge of all the facts and circumstances which Sweeny is alleged to have had, would have paid more than $5,000 for the plaintiffs' claims. It is equally true that except for the advantages afforded by the ownership of the Poorman mine adjoining, no purchaser, with full knowledge of the facts, as they are alleged by the plaintiffs to have been, would have paid $5,000 for the property.

Recurring to the consideration of the alleged misstatements on the part of Sweeny and Culbertson, and the withholding of information by them from the plaintiffs, as to what they had discovered through the development work by diamond drill and otherwise, the charge that the possession or acts of the defendants were clandestine is completely disproven. Sweeny and Culbertson deny that any misrepresentations were made, or that any information was withheld; plaintiffs' witness Jay

testifies that at the time of the alleged developments there were 200 men working in the mine and in the adjoining ground, the Poorman claim; and that the diamond drill work was done by contract work in the ordinary course of such business. It is not alleged, or claimed, that the works were closed against the plaintiffs at any time, or that the plaintiffs, or anyone in their behalf, ever sought to enter, or make inquiry as to the nature or character of the development work, or as to what had been discovered thereby. It is equally clear from the testimony of plaintiff Clark that he did not take Sweeny's valuation, or his word, as to the value of the claims; that he utterly rejected the offer made by Sweeny and fixed a price of his own which Sweeny eventually agreed to.

In order to establish the contention of plaintiffs that they sold on the representation of Sweeny and Culbertson, or either of them, as to the value of the property, it is necessary that they should have sold for the price and value fixed by Sweeny or Culbertson. The very fact that they entered into a contention with Sweeny in regard to the value is conclusive proof that they had, or thought they had, information sufficient to enable them to fix a price upon the property independent of Sweeny or Culbertson, and that they were on inquiry as to values. If they did not accept Sweeny's valuation and yet sold the property for less than what it was worth, they cannot hold Sweeny, or those for whom he acted, responsible, and can claim nothing by reason of the alleged undervaluation of the property.

The plaintiffs have called to their assistance Joseph McDonald, who, in the most unblushing manner, testifies that he was voluntarily a party to a scheme to defraud the plaintiffs; that he assisted Sweeny and Culbertson therein, and with great detail and circumspection, undertakes to narrate conversations with Sweeny, and arrangements entered into between himself and Sweeny, that if true should place him behind the doors of some reformatory institution. He undertakes to justify his statements on the ground that "a man should be true to his employer."

He admits thereby that he would be willing to enter into a scheme to defraud his neighbor, or persons for whom he pretended personal friendship, at the instance of his employer. He is contradicted by both Sweeny and Culbertson, and in some of his most explicit and circumstantial statements as to the striking of ore in the drill holes, and as to his personal inspection, and participation therein, he is contradicted by disinterested witnesses, who had charge of the drills and who were doing the work. With much apparent precision he testified that the ore was struck during the night, and that he was called up on the telephone and advised of the fact, and that he went up to the mine in the night to see to the work (Trans., p. 370), and then testifies in detail as to what occurred; while the time books, and the impartial record kept by the drill men, show that the ore was struck about the middle of the day, and all of the men connected with the work swear positively that McDonald was not there at any time in connection therewith.

As suggested by the Circuit Court in its decision, he was at all times very careful not to fix accurate dates, notwithstanding the fact that he had claimed great responsibility in regard to all of these things. The fact is that McDonald, through motives not necessary to inquire particularly about, has undertaken to furnish testimony to break down the defendants, and especially Sweeny and Culbertson. His malice is so apparent throughout his testimony that, taken in connection with the foregoing suggestions, we feel that he may be dismissed from the consideration of the case as an unimportant factor therein, despite the fact that he had evidently assumed to direct the result of the case by his testimony. Appellants devote much attention to his testimony in their brief, doubtless for the reason that he is a chief factor in prosecuting the suit and represents the sensational element so prominent therein. He is shown to be entirely unworthy of belief, both by the overwhelming evidence of living witnesses and by the incontrovertible evidence of the rocks, as they existed then and now. He is discredited in his statement as to ore in the east drift from the crosscut by the testimony of all plaintiffs' witnesses, and by the visible evidence of the rocks there now for inspection. He says (Trans. p. 379), the crosscut showed from four to six feet of clean shipping ore. When we challenged them to go there, with the Court's officer, to test the truth of this statement, they dared not do so, as the fact would have appeared that there was no clean shipping ore there, and only a few inches of concentrating ore. On page 380 he says the crosscut

showed five feet of clean shipping ore. The evidence showed, and the fact is, that there was not to exceed four inches of ore such as we have brought into court, and no clean shipping ore at all. On page 291 he says the ore in the east drift from the crosscut was in about 100 feet when he was last there; that the ore body in the drift was the same as in the crosscut which he had said was in from eight to fifteen feet of clean shipping ore. This whole statement is shown by all the testimony to be so outrageously false that he stands alone, and the complainants dared not submit the premises to inspection, which would have shown absolutely no foundation for such a statement.

Much of the testimony was directed to the amount of ore produced from below the 1200 foot level within the Ella and Missing Link claims, and as to the width of the ledge, size of ore bodies, etc. As we have before suggested, such testimony had no bearing whatever upon the issues in the case, but was called forth for the purpose of creating a prejudice, or perhaps a sympathy would express it better, for the parties who claim to have sold a mining claim for less than it was worth.

The plaintiff introduced the testimony of Ralston, McDonald, and others, to the effect that at the intermediate drift there was several feet of shipping ore, and these witnesses sought to create the impression that a great mine had really been discovered prior to the sale by plaintiffs. The floor of the level where this ore was said to have been discovered, re-

mains intact to this day, and upon an investigation of the point at which the ore was said to have been from five to seven feet, we found a streak of ore less than four inches in width, and that of only medium quality. Such streaks are not indications of great values, and more frequently prove to be small bodies of ore of no value. At the time of the sale these streaks had not been developed.

We challeneged the plaintiff to send upon the ground engineers to be appointed by the Court, or that the Court should go upon the ground, to determine as to whether or not the witnesses for the plaintiff or defendant were telling the truth in regard to the amount of ore at the intermediate drift. The complainant strenuously opposed any examination being made by the Court or the Court's representatives. But one inference can be drawn from this. They knew that the testimony which they had given in regard to the existence of large ore bodies at this point was untrue, and that an inspection of the ground by the Court would determine that fact.

The claim made all through the case that Sweeny and Culbertson were laying deep plans and scheming day and night to get the property, is not sustained; as a matter of fact, Culbertson did not think enough of it to record his deeds until long after it is claimed that he was advised of the great value of the mine, and in as much as Sweeny, while aware of the diamond drill holes and the results found in them in August, made no attempt to purchase the property or to approach the owners thereof until October. The fact that between the date

that the deal was agreed upon and the delivery of the deed, seven days elapsed during which Clark could have made any inquiry or examination that he had seen fit to make, clearly proves that there is no foundation whatever for the charge of surreptitious dealing, or the suppression of facts, or anxiety on the part of Sweeny or Culbertson that the deal should be closed.

The question as to the discovery of rich bodies of ore at the intermediate drift and at the face of the crosscut was, perhaps, of more importance than any other question involved in the case, if we are to exonerate the plaintiffs from any liability to determine the value of the mine for themselves, and to allow them to rely entirely upon the representations which they claim were made by Sweeny. As these are the only two points on the ledge which had been developed, except diamond drill work, prior to the sale, and an inspection by the Court or its representatives would have determined this point to an absolute certainty, yet the plaintiffs resisted such examination.

The attempt throughout the case on the part of the plaintiff to avoid the facts in regard to the 600 and 800-foot levels, and their failure, voluntarily, to bring in any evidence, as a part of their case, on that subject, indicates a lack of candor and good faith in the presentation of their case to the Court, which is in keeping with their refusal to have the facts determined by an inspection of the ground by the Court or its officers.

OBJECTIONS TO ADMISSION OF TESTIMONY.

At pages 140-6 will be found the defendants' motion in support of the several objections and exceptions taken before the examiner. This motion is made to strike from the record matters improperly admitted therein, and was brought on for hearing before the Circuit Court preliminary to the hearing upon the main case. The Court declined to strike out the matters set forth in defendants' motion, and exception was taken, and defendants' bill of exceptions settled. (Trans., p. 146.)

Inasmuch as the Court entered a decree in favor of the defendants, it may be suggested that the defendants should not fact that this Court will review the entire record, and may, complain of any action taken by the Court, but in view of the under the rule, arrive at an entirely different conclusion from that arrived at by the Circuit Court, we feel it incumbent upon us to urge these objections saved in the record at the time of the taking of the testimony before the examiner.

At page 431 of the Transcript it will appear that the west drift, referred to in the question, was not made until after the title had passed from the plaintiffs; in fact, that it was not started until the first of November, 1899. The same was true as to the next objection, which is found on page 432 of the Transcript, and the following objection, found on page 433 of the Transcript, the next one on page 436, and also of the objections on pages 440, 441 and 442.

These objections are all directed to testimony as to the condition of the mine, and things that had transpired, after the title had passed from the plaintiffs to the defendant, the Buffalo Hump Mining Company. It was an attempt on the part of the complainants to support their allegations that the knowledge had by Sweeny and Culbertson was withheld from the sellers by showing the development of ore bodies, and things that happened, after the title had passed.

The first and second objections to the testimony of Patrick Clark, one of the complainants, as to the conversations had with Culbertson, are based upon the principle that conversations with Culbertson as to any arrangement existing between Culbertson and the complainants by which he was to give them private or secret information as to the condition of the property which he was employed in superintending could not affect the rights of the defendants, and was an attempt on their part to interpose an improper contract or understanding between Culbertson and them, which they sought to take advantage of in support of their contention that the defendants were bound to help Culbertson carry out such a discreditable arrangement against their interests.

The next objection is as to the question propounded to Mr. Clark, page 488 of the Transcript, wherein he was asked: "Now, Mr. Clark, assuming that Mr. Sweeny had advised you that at the time he purchased this interest of you for the Buffalo Hump Mining Company, that a vein of ore four feet in width had been struck by diamond drill on the 1200-foot level on

the east end of the Ella, and that a drift had been driven through fifteen feet of ore on the west end of the Ella, what would you have asked for your four-fifths interest which you sold to him that day, and what would it have been worth?"

The objection to this question was based upon the fact that no such condition of facts existed, even if testimony had been introduced to sustain such a question; that it assumed that Mr. Sweeny had exclusive knowledge, and it also assumed that Mr. Clark had neither the knowledge nor the means of obtaining it.

On page 489 of the Transcript, plaintiffs introduced the annual report made by Charles Sweeny for the year ending April 30th, 1901, which is complainants' Exhibit No. 17. Objection was made to this, that it was clearly inadmissable, inasmuch as it was the annual report of Sweeny as to all of the properties of the defendant, the Empire State-Idaho Mining & Developing Company, and no separate statement of facts as to the grounds in controversy was made therein which could in any way affect the rights of the parties to this action, or bind them as to an admission of any facts. Another objection was that it was incorporating into the record a vast amount of useless matter, which, if it contained any statements beneficial to the complainants, such statements might have been separated from the report and used for whatever they were worth.

At page 521, the complainant Clark was asked if he believed the statements made by Culbertson and Sweeny at the time the deal was made. It was not claimed that Culbertson

made any statements to them, at or near that time, and whether he believed the statements of Sweeny or not would not affect this case unless it were shown that he had a right to rely upon such statements, and had no knowledge of his own on the subjects referred to in such statements. Mr. Clark is shown to have had such an intimate knowledge and acquaintance with the ground in controversy that, taken in connection with his experience as a miner and his acquaintance with the ledge, preclude the possibility that Sweeny, who, at that time had not been in the mine at all, had made statements upon which Mr. Clark relied in fixing the price for his property, and in view of the fact that Mr. Sweeny did not fix the price at all at which he would sell, but that Clark refused the price that Sweeny offered him, and fixed his own price, would indicate that Clark did not accept Sweeny's statement, and is presumed to have fixed the price, based upon his own knowledge, because he says Sweeny told him the property was not worth anything. Now why should Clark refuse to take $2500, which Sweeny first offered him for property which Sweeny said was worth nothing, if he was to take Sweeny's word for the value of the property? And the conclusion is obvious that inasmuch as Clark fixed his own price on the property he must have rejected Sweeny's statement as to its value and placed a value upon it entirely independent of what Sweeny had told him.

On the same page of the Transcript, the witness was asked if he acted on the statements of Culbertson and Sweeny in conjunction with the fact that he did not have any other

information in the matter, and, over the objections of the defendants, he responded that he did. This comes within the suggestions just made as to the preceding question.

On page 524 of the Transcript the complainant, Patrick Clark, was asked: "Now, assuming, and we will make a proper apology to the gentlemen on the other side.—assuming that they were attempting to perpetrate a fraud upon you, and they had invited you into the mine to inspect it, explain whether or not it would have been possible to block this crosscut and send you off into the abandoned drift there, or whether you could have detected the discovery of any ore there?"

This was objected to as an improper form of question, and that it was asking the witness to assume something that it was not charged they ever tried to do. The witness answered that if they had wanted to hide the discovery of ore, they could have put in some timbers and blocked it up so he could not tell anything about it. This is in keeping with the subterfuge shown in his testimony in regard to being excluded from the mine, page 503.

This class of testimony, while it may not have affected the result, should have been stricken out by the Court. They first set up an imaginary wrong, and then proceed to demolish it at the expense of the defendants.

At pages 532-4, witness Kingsbury, one of the plaintiffs, was allowed, over the objection of defendants, to testify to conversations between himself and his co-plaintiffs in regard to the understanding and conditions under which Culbertson ac-

quired his interest. Such conversations were certainly not admissable as against these defendants for any purpose.

At page 534 witness Kingsbury was asked as to the value of the property, under certain hypothetical conditions, none of which conditions had been shown to exist.

At page 562 of the Transcript the plaintiffs offered in evidence an escrow agreement between David Holzman and the plaintiff Patrick Clark, which had no possible connection with the case, and then offered in evidence a deed from Holzman to Clark for no purpose whatever except to encumber the record with useless documents.

At page 582 of the Transcript, J. N. Justice, a witness called on behalf of plaintiffs, was allowed, over the objections of defendants, to testify as to conversations between himself and Sweeny, alleged to have taken place in the spring of 1900, more than six months after the property had passed from the complainants to the defendants, when such conversation showed on its face that it related to the purchase of the Tiger-Poorman Company, and not to the property in controversy in this action, and was utterly irrelevant and immaterial.

At page 642 of the Transcript, complainants' counsel called W. B. Heyburn, the solicitor for the defendants in this case, and asked whether or not Charles Sweeny, General Manager of the defendants, was the same Charles Sweeny mentioned in the case of Hanley vs. Sweeny, reported in Volume 109 of the Federal Reporter at page 712, and upon witness testifying that he was the same person, they offered in evidence

the opinion of this Court in that case, which is spread at length upon the Transcript from page 642 to 672, and is again printed in the Transcript as an Exhibit, at page 1232, thus occupying sixty pages of the printed record in this case, and we think that an inspection of this record will show that more than two hundred and fifty pages of it are taken up with the printing of useless and unnecessary documents.

We objected to the introduction of this document for the reason that it was offered for the purpose of discrediting Sweeny, and, in fact, outlawing him in the Court.

We may take occasion here to remark that perhaps no record in any appeal is so replete with approbrious terms, epithets, and charges, as the record in this case. It would seem that the plaintiffs have gone out of their way to find occasion for the repeated use of such terms, and all in the same spirit of the introduction of this opinion at length and the repeated printing of it in the record. It is safe to assume that the Court, upon the simple identification of the parties, would have given whatever weight might be given to it under the established rules of evidence. It was in any event irrelevant and entirely immaterial matter.

At pages 672-3 of the Transcript, Albert Allen was called to testify to conversations alleged to have been had with Mr. Sweeny, in regard to the purchase of these claims, some time in March or April, 1900, which was about six months after the purchase of this property by the defendants. This testimony was admitted over the objections of defendants, and the

witness was permitted to draw from his recollection a diagram which he said was similar to one which Sweeny drew while talking to him.

At page 948 and page 950 of Transcript, J. L. Rivers, a stenographer, was permitted to introduce, over the objections of defendants, the proceedings in a case covering nearly 30 pages, as to what witness McDonald said, and what transpired, in a suit having no bearing upon this cause, in which the testimony was taken in January, 1900. The testimony was incompetent as a whole. If any part of it was relevant it should have been selected and segregated from the mass of the record in that case and so introduced. As it is, the entire testimony may be disregarded and the objection to it should have been sustained.

At page 999 of the record, the complainants have interjected an affidavit made by Mr. Sweeny in this case upon an application made by the complainants for an injunction and receiver. This affidavit extends from page 999 to 1012 inclusive. It is an unnecessary incumbrance of the record, and if there are any points in it that should have been used in contradicting Mr. Sweeny, his attention should have been called to them in a specific manner, and such parts as were material only brought into the record.

In regard to the introduction into the record of these lengthy documents upon the slight excuse that there is something contained in them that might be pertinent, we would suggest that it would be as reasonable upon asking a man if he

was a citizen of the United States, to immediately introduce the Constitution of the United States and the Statutes at Large.

At page 1080 of the Transcript, one of the complainants is permitted to testify as to a conversation had with his co-plaintiff in regard to statements made by Culbertson. The question and answer are such an obvious violation of the rule of evidence that we merely call the Court's attention to them.

We have expended more time and space upon this questions of the record than we would be justified in doing except for the reason that a bad practice has grown up in the taking of testimony before an examiner, which results in encumbering the record of the case with a vast amount of useless and redundant matter, which adds greatly to the labor of counsel and of the Court in sifting the case down to the real facts in controversy, as well as adding enormously to the expense of printing the record.

In this case we have a volume of exhibits, the greater part of which were unnecessary in the case, and in many instances, as before suggested, they are a repetition of exhibits already spread upon the Transcript at length.

From the record and testimony in this case it appears that while Patrick Clark was the General Manager and representative of the Coeur d'Alene Silver-Lead Mining Company, a corporation having its principal place of business at Butte, Montana, and being represented in Idaho only by Patrick Clark, and owning the Poorman mine, in adjusting its lines on the east end, found, or created, a fraction of ground between the

Poorman and the O'Neil lode claims. This fraction of ground was located as the "Ella" and "Missing Link" claims, the Missing Link being evidently the result of a second determination of the fraction. Patrick Clark, his brother James Clark, James Harvey, his nephew, and B. C. Kingsbury, all of them either in the employ of the Coeur d'Alene Silver-Lead Mining Company, or interested in it as stockholders, or officers, secured to themselves these two fractions of ground lying practically on top of the mountain to the east of Canyon Creek and on the east end of the Poorman mining claim.

It is conceded by both sides that, except at great expense, this fraction of ground can only be worked in connection with the Poorman mine. It appears that, while Patrick Clark and James Harvey, were occupying positions in the employ of the company, taking advantage of the development upon the Poorman claim and of the facilities which such development offered for the working of the two fractions claimed by them, they drove the 600 and 800 foot levels, at the expense of their employer, from the Poorman mine into, and practically through, their fractions, and with the aid of the machinery, and taking advantage of the investment of the company, they extracted $16,524.78 net values in ore from the fractions and divided it between themselves; they shipped two hundred and eighty-three tons of ore.

These suggestions are not made in a spirit of recrimination, but for the purpose of determining the relation of complainants to the Ella and Missing Link mine during their own-

ership and management thereof; their method of operating it, and the relation which these fractions have borne to the Poorman mine; and as to its bearing on the knowledge which the complainants had of the ore bodies within the fraction, and the profit or loss, at which such ore bodies could be worked.

Another item of history interesting in this case is found in the testimony of Clark, as well as in the allegations of the bill, wherein it would seem, according to the claim of the complainants, that they entered into a secret arrangement with Mr. Culbertson, whose time and services were the property of the Consolidated Tiger-Poorman Mining Company, under which they claim that Mr. Culbertson, while representing his company, should at the same time represent them and give them secret information based upon the operations of his company, from which they might derive an advantage and possibly a profit.

Clark and Kingsbury had made a secret arrangement to sell out their stock in the old company to Culbertson, unknown to their fellow stockholders, quite in keeping with their former plan of working their individual property at the expense of the stockholders of the company they represented. (Trans. p. 238.)

All of the assignments of error are covered by the foregoing consideration of the case from the standpoint of defendants.

The brief of counsel deals in abuse, innuendo, and harsh criticism of the parties and their witnesses, the manner of conducting the case, and the conclusions reached by the Court.

We have not thought it best to enter into a reply in kind. The criticism of the Circuit Court, at page 58 of their brief, would seem to be a violation of that rule of conservative action that should distinguish counsel in dealing with the opinion of the Court. The charge made against Mr. Culbertson and Mr. Sweeny, on pages 57 and 58, seems to be beyond the rule of courteous consideration that should be given to parties and witnesses in a court of justice. If the conduct of the case on the part of defendants was in violation of the recognized rules of law and practice, plaintiffs have their remedy by review in the proper courts, and should seek it there rather than in the vocabulary of abuse.

There is nothing in the record in this case to bring it within the rule of the authorities cited on pages 121 and 122 of appellants' brief, nor is there anything in the record that would authorize the Court to take into consideration the question of the expense of taking testimony in New York or of the failure to take testimony there.

Figures 2 and 3, at pages 109 and 111 of appellants' brief, represent nothing in this case. We have the ore in court. They have brought an imaginary picture of the ore seam; the actual ore, showing its width and character, is in court for examination.

We think that upon the record in this case the Court was justified in concluding that the complainants had delayed unnecessarily in commencing their suit.

It is one of a class of cases in which the Court does not permit a long delay on the part of a vendor in order that he may take advantage of the developments of a mine at the expense of another, to raise questions regarding the sale based upon such developments.

THE LAW OF THE CASE.

The rule that in all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practiced by a defendant upon a plaintiff, the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory, is well established law.

Lalone vs. United States, 164 U. S., 255.

Representations as to the nature, quantity, or quality of the property or of the title by which it is held, however false in respect to the subject, which is mere matter of opinion such as estimates of value, or quantity of wood there is on land, or productiveness of soil, etc., are insufficient in themselves to entitle either party to a recision of the contract.

Warvelle on Vendors, Section 847.
Homer vs. Perkins, 124 Mass., 431.
Hoffman vs. Wilhelm, 68 Iowa, 510.
Mooney vs. Miller, 102 Mass., 217.

The law presumes that each party to a contract to sell relies on his own judgment as to the value of the property sold where the facts upon which the value of the property depends are known, or may be known, to both.

Speiglemeyer vs. Crawford, 6th page, 254.
Fairchild vs. McMahon, 139 N. Y., 290.

There being no evidence of mental incapacity in the party relying on alleged statements, other than that afforded by the transaction itself, with equal means of knowing the truth, no statements by either party can be made available for the purpose of avoiding the sale. Particularly is this true where the party relying on such statements has a full knowledge of the value of the property, or is personally familiar and acquainted with the same, and has had reasonable opportunities of informing himself as to its value.

Brook vs. Hamilton, 16th Mass, 26.
Shackleton vs. Lawrence, 65 Ill., 175.
Slaughter vs. Gurson, 13 Wallace, 379.

The rule of law stated by Mr. Justice Field in this case is peculiarly applicable to the case at bar. The Court holds that the misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge; and it must be a

misrepresentation upon which he relied, and by which he was actually misled to his injury.

Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations.

This rule of law is alike applicable to either vendor or vendee.

We have not undertaken to discuss all of the testimony in this case because we believe that the Court will carefully consider it and readily arrive at conclusions obviously to be drawn therefrom in determining the weight to be given to the testimony of the various witnesses, and the good or bad faith evinced by the witnesses when testifying.

While there is a decided conflict of testimony between the witnesses for plaintiffs and defendants, the circumstances surrounding the entire transaction, taken in connection with the facts to be deduced from the testimony, would lead to the conclusion that the allegations of the plaintiffs' bill were not sustained; that the defendants had been guilty of no act or thing that would entitle the plaintiffs to the relief sought in this action.

Respectfully submitted,

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